No. 99-901

Supreme Court, U.S.
FILED
JUN 2 0 2000
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION
and RONNIE CARTER,
Executive Director and Individually,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* KENTUCKY HIGH SCHOOL ATHLETIC ASSOCIATION IN SUPPORT OF RESPONDENTS TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION AND RONNIE CARTER

DANNY C. REEVES
Counsel of Record
GREENEBAUM DOLL & MCDONALD, PLLC
333 West Vinc Street
Suite 1400
Lexington, Kentucky 40507
(859) 231-8500

DAVID A. FRENCH
CORNELL LAW SCHOOL
Myron Taylor Hall
Ithaca, New York 14950
(607) 255-0146

Attorneys for Amicus Curiae

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT OF AMICUS CURIAE	6
A. THE RECRUITING RULE IS A RATIONAL REGULATION REASONABLY RELATED TO THE VOLUNTARY ACCEPTANCE OF THE BENEFIT OF TSSAA MEMBERSHIP AND, THEREFORE, IS CONSTITUTIONAL	6
B. BECAUSE BRENTWOOD ACADEMY IS A VOTING MEMBER OF AN ALLEGED STATE ORGANIZATION, THE "PUBLIC CONCERN" DOCTRINE IS APPLICABLE AND FATAL TO BRENTWOOD ACADEMY'S CLAIMS	10
C. ALTERNATIVELY, BRENTWOOD ACADEMY'S RECRUITING ACTIVITIES CONSTITUTE, AT MOST, COMMERCIAL SPEECH. THE RECRUITING RULE IS A PROPER LIMITATION ON THAT SPEECH	13
CONCLUSION	16

TABLE OF AUTHORITIES

CASES: Page(s)

Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr, 518 U.S. 668 (1996) 4,11,12

Board of Trustees of the State University of New York v. Fox, 492 U.S. 469 (1989) 13-14,15

Brentwood Academy v. Tennessee Secondary Schools Athletic Association, 13 F. Supp.2d 670 (M.D. Tenn. 1998) 9-10,13,15

Central Hudson Gas & Electric Corp. v. Public Services Comm'n of New York, 447 U.S. 557 (1980) 15

Connick v. Myers, 461 U.S. 138 (1983) 4,10-11

FCC v. League of Women Voters of California, 468 U.S. 364 (1984) 8

Pickering v. Board of Ed. of Township High School Dist., 391 U.S. 563 (1968) 11,12

Regan v. Taxation With Representation, 461 U.S. 540 (1983) 9,10

Roth v. United States, 354 U.S. 476 (1957) 12

Rust v. Sullivan, 500 U.S. 173 (1991) 4,6-8,11

Speiser v. Randall, 357 U.S. 513 (1958) 8

Waters v. Churchill, 511 U.S. 661 (1994) 12

I. INTEREST OF AMICUS CURIAE

Amicus Kentucky High School Athletic Association (the "KHSAA") is a voluntary, unincorporated association consisting of approximately 286 public, private and parochial member schools located throughout the Commonwealth of Kentucky. The KHSAA was organized in 1917 by principals of several schools for the purpose of regulating high school athletics in Kentucky.[1] The KHSAA, like the Tennessee Secondary School Athletic Association (the "TSSAA") works to ensure that member schools compete in a fair and safe athletic environment. If the TSSAA's Recruiting Rule is held unconstitutional, the KHSAA is concerned that the ability of all state high school athletic organizations to protect the competitive equity of the high school sports experience will be fatally compromised. Additionally, the KHSAA is concerned that the elimination of recruiting rules will make athletically gifted children and their parents – many of them from economically and socially disadvantaged backgrounds – vulnerable to coercive and abusive recruiting practices.

II. SUMMARY OF ARGUMENT

The state action question is merely the first hurdle that Brentwood Academy must cross before it can achieve its ultimate goal: the use of First Amendment principles to invalidate the TSSAA's Recruiting Rule and cripple the ability of the TSSAA to regulate Brentwood

---

[1] Pursuant to Rule 37.3(a) the parties have consented to the filing of this brief. The written consent signed by the parties has been tendered to the Clerk of this Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no other person or entity made a financial contribution to the preparation or submission of this brief.

Academy's powerful, abusive athletic program. Brentwood Academy cannot ultimately prevail in this litigation unless it can demonstrate not only that the TSSAA is a state actor, but also that the TSSAA deprived Brentwood Academy of its civil rights – specifically, its alleged First Amendment free speech right to recruit athletes.

In its Brief, Brentwood Academy labels its First Amendment argument "The School Choice Concern" and waxes eloquent about the alleged high constitutional stakes of this case. (*See* Petitioner's Brief, pp. 24-26.) According to Brentwood Academy, this case is about nothing less than the state's attempt to "own" school age children. In Brentwood Academy's view, the TSSAA "commodifie[s] students" and treats them as mere means to a rather banal communal end – winning high school sports championships. (*Id.* at pg. 24.) Were this case about an attempt to end private sectarian education, or were this case about an attempt to regulate the content and nature of private education, then the weighty issues of "ownership" and "commodification" would need to be addressed. However, this is not such a case.

By peering through the fog of lofty rhetoric to the more humble reality of the situation, it becomes clear what is actually at stake in this litigation – Brentwood Academy's attempt to "have it all." Brentwood Academy has taken the legitimate, constitutionally-protected step of creating an academic, Christian institution that is outside and independent of the public school system. Brentwood Academy's unquestioned right to create such an institution is not at issue here. Nor is its unquestioned right

to attract students to educate and enlighten. What is at issue is the second step — Brentwood Academy's voluntary step *back into* the state arena for the sake of public athletic achievement. Let us be clear, if Brentwood Academy's sole athletic concern was the provision of a forum for physical education and competition for its students, it would not have to be a member of the TSSAA. Brentwood Academy is perfectly free to opt out of (or not join in the first instance) the TSSAA structure and engage in athletic competition with other, like-minded schools. In Kentucky, for example, several sectarian high schools have chosen just such a path and have formed their own, independent leagues.

Unfortunately, this path is generally not the path to glory. If Brentwood Academy were to choose to leave the TSSAA, and thereby lose its right to compete for the TSSAA championship, it would forfeit its national reputation as a high school football powerhouse. Gone would be the articles in *USA Today* and the *Nashville Tennessean*. Gone would be the national rankings and the local notoriety. Brentwood Academy would be left simply as a private, Christian school full of students free to study, grow, and play sports – all in relative obscurity. While such obscurity would be a bitter pill for the coaches and many of the school's boosters, it would not constitute a deprivation of constitutional rights.

With this lawsuit, Brentwood Academy is not just seeking the right to compete within the TSSAA, it is seeking the "right" to compete on its own terms. As a private school, free of any geographic restrictions on student attendance, Brentwood Academy is able to recruit students throughout Tennessee. Through scholarships and other enticements that Brentwood Academy believes it has a constitutional right to offer, every

good quarterback, lineman and cornerback in junior high is a potential Brentwood Academy star. By contrast, public high schools are tied to definite, limited geographic regions. For Hillsboro High School in Nashville to entice the best, it would somehow have to persuade entire families to uproot, leave their community and move to a new home in Hillsboro's district. Faced with such an obviously imbalanced playing field, the TSSAA has chosen to prohibit all schools from recruiting. Brentwood Academy challenges this restriction, not (as they contend) for the sake of liberty, but rather for the sake of Greater Gridiron Glory. First Amendment doctrine should not be butchered for the sake of Brentwood Academy's athletic hubris.

There are multiple reasons why the TSSAA's Recruiting Rule does not violate Brentwood Academy's free speech rights. First, the Recruiting Rule is a rational restriction that is within the scope of the TSSAA's legitimate oversight of high school athletics. When Brentwood Academy voluntarily joined the TSSAA, it made itself subject to such rational restrictions. The government is clearly able to impose restrictions – even content-based restrictions on speech – that are related to and within the scope of government programs or benefits offered. For example, the "gag rule" on athletic recruiting imposed by the TSSAA is no more onerous than the "gag rule" on abortion information formerly imposed by the federal government – and upheld by this Court – on recipients of Title X funding. *See Rust v. Sullivan*, 500 U.S. 173 (1991).

Additionally, the "public concern" doctrine outlined in *Connick v. Myers*, 461 U.S. 138 (1983) and *Board of County Commissioners, Waubaunsee County, Kansas v. Umbehr*, 518 U.S. 668 (1996) should be applied to

Brentwood Academy, a voting member of an alleged state organization. If the TSSAA is a state actor, then Brentwood Academy, as a voting member, is a part of that government and certainly as closely related to the state as any employee or contractor. Unlike most state employees or contractors, Brentwood Academy has a voice in the actual content of all of the TSSAA's regulations, including the Recruiting Rule. When Brentwood Academy is subject to speech-related rules that are related to its voluntary membership in a state organization, related to the conduct of that organization and do not touch on matters of public concern, then its complaints about those rules should not be cognizable in this Court.

Finally, at most, Brentwood Academy's recruiting activities constitute nothing more than commercial speech. Brentwood Academy is seeking the right to propose commercial transactions – the enrollment of tuition-paying students – to selected individuals with demonstrated athletic talent. As commercial speech, the Recruiting Rule is only subject to "intermediate" First Amendment scrutiny. The TSSAA is attempting to guard two substantial interests: i) a child's (and his or her family's) freedom from coercive and destructive recruiting environments; and ii) its member school's interests in a fair and equitable "playing field." The Recruiting Rule directly advances those interests and is sufficiently narrowly drawn to pass intermediate scrutiny. Thus, even if the TSSAA is a state actor, Brentwood Academy's underlying First Amendment free speech claims are without merit. The judgment of the Sixth Circuit should be affirmed.

III. ARGUMENT OF AMICUS CURIAE

A. The Recruiting Rule Is A Rational Regulation Reasonably Related To The Voluntary Acceptance Of The Benefit Of TSSAA Membership And, Therefore, Is Constitutional.

Brentwood Academy claims that, by requiring that its member schools adhere to the Recruiting Rule, the TSSAA is unconstitutionally "suppressing speech" and "thereby restricting educational opportunity for students." (Petitioner's Brief, at pg. 25.) This argument is a gross exaggeration of the true purpose, nature and consequences of the TSSAA's Recruiting Rule. In reality, the TSSAA has created a rational, limited regulation that is directly related to the goals and mission of the TSSAA itself – the creation of safe and fair athletic environments. When Brentwood Academy elected to receive the benefits of TSSAA membership, it made itself subject to reasonable regulation related to those benefits. This Court has long held that such regulations, even if speech-related, are acceptable so long as the regulation imposed is directly related to the benefit received.

> The most comparable case is *Rust v. Sullivan, supra*. In *Rust*, the plaintiffs challenged federal regulations that prohibited Title X projects and recipients of Title X funding[2] from providing patients and the public with certain information regarding abortion. 500 U.S. at 173.

---

[2] 2 Title X of the Public Health Service Act, 84 Stat. 1506, was enacted in 1970 and provides for federal funding for family planning services. *Rust*, 500 U.S. at 173.

> The challenged regulations were both broad and specifically content-based. First, the regulations specified that a Title X project "may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." *Id.*, at 179 quoting 42 CFR § 59.8(a)(1) (1989). Second, the regulations broadly prohibited a Title X project from engaging in activities that "encourage, promote or advocate abortion as a method of family planning." *Id.* quoting 42 CFR § 59.10(a) (1989). Third, the regulations required that Title X projects be organized so that they are "physically and financially separate" from prohibited abortion activities. *Id.* at 180, quoting 42 CFR § 59.9 (1989). Collectively, these regulations became known as the "gag rule."

Before this Court, the plaintiffs argued, among other things, that the "gag rule" was unconstitutional because it conditioned the receipt of a benefit (*i.e.*, Title X funding) on the relinquishment of a constitutional right (*i.e.*, the right to engage in abortion advocacy and counseling). *Id.* at 196. The Court disagreed, holding that plaintiffs' reliance on "unconstitutional conditions" cases was "unavailing."

> . . . here the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purpose for which they were authorized. The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities.

Id.

The Court distinguished "unconstitutional conditions" cases, noting that those cases involved situations where the government placed conditions on the "recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct *outside the scope of the federally funded program*." *Id.* (emphasis added). For example, in *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984), the Court invalidated a federal law prohibiting noncommercial television and radio stations that received federal funds from engaging in any editorializing. The fund recipient could not segregate its activities according to funding and thereby had to forfeit all of its rights to editorialize in exchange for receiving even 1% funding. 468 U.S. at 400. However, the Court specifically noted that the regulations would be valid if they permitted stations to establish "affiliate" organizations which "could then use the station's facilities to editorialize with nonfederal funds."

Similarly, in *Speiser v. Randall*, 357 U.S. 513 (1958), this Court invalidated a requirement by the State of California that anyone seeking to take advantage of a specific tax exemption must first sign a declaration stating that he did not advocate the forcible overthrow of the Government of the United States. In *Speiser*, there was no real argument that the prohibited speech was in any way realistically related to the property tax exemption. Instead, the denial of tax exemptions to those who would not sign the declaration was "frankly aimed at the suppression of dangerous ideas." 357 U.S. at 519.

If the TSSAA Recruiting Rule prohibited, as a condition to membership, TSSAA schools from ever recruiting any prospective student, regardless of athletic prow-

ess or interest, or if the TSSAA required that Brentwood Academy sign a loyalty oath to the public school system, then an unconstitutional condition might exist. The Recruiting Rule, however, is limited to the specific scope of the alleged government benefit at issue here – membership in a state high school athletic association. The rule only prohibits the "use of undue influence on a student" to secure or retain a student "*for athletic purposes*." *See*, Article II, Section 21, TSSAA By-Laws (emphasis added). In other words, students are not to be "singled out" based on their potential athletic ability.

Brentwood Academy would have the Court believe that the TSSAA is seeking to stamp out private education by prohibiting virtually all contact between private school officials and prospective students. By reading the Recruiting Rule more broadly than its plain language allows, Brentwood Academy has created a straw man. The Recruiting Rule is directly tied to the provision of the alleged state benefit – membership in a state high school athletic association – and, therefore, is within the scope of the alleged state program. As *Rust* makes clear, gag rules can even be imposed on speech concerning the exercise of fundamental constitutional rights when those rules are in direct furtherance of the constitutionally permissible goals of a government program. *See also Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (upholding the federal statutory requirement that Section 501(c)(3) charitable organizations refrain from substantial lobbying activities as a precondition to tax-exempt status).

The District Court, by simply inquiring whether the Recruiting Rule is content-based (of course it is), completely missed the proper First Amendment analysis. (*See Brentwood Academy v. Tennessee Secondary Schools*

Athletic Association, et al., 13 F. Supp.2d 670, 688 (M.D. Tenn. 1998). The regulations examined in *Rust* were content-based and so was the statute upheld in *Regan*. The critical first inquiry is not into content but into context. When Brentwood Academy is speaking in the context of its voluntary membership of the TSSAA and speaking in direct violation of TSSAA rules, strict scrutiny simply does not apply. As mentioned above, the correct inquiry is into the relationship of the challenged rule to the goals and scope of the government benefit. When the state's goals are legitimate – as protection of minors from undue influence and the protection of institutions from unfair advantage undoubtedly is – and participation voluntary, then Brentwood Academy's only hope is to challenge the scope of the regulation. Few rules are more within the scope of high school athletics than rules regarding, and limited to, the recruitment of athletes.

B. Because Brentwood Academy Is A Voting Member Of An Alleged State Organization, The "Public Concern" Doctrine Is Applicable And Fatal To Brentwood Academy's Claims.

It has by now become well-established that the First Amendment rights of public employees and contractors are far from absolute. In fact, as a threshold matter, a public employee or contractor must first prove that his or her speech implicates a matter of "public concern" before a Court will invoke the protections of the First Amendment. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138 (1983) (holding that a former district attorney's speech regarding such things as of-

fice morale and travel policy did not implicate matters of public concern and limitations on such speech were not actionable in federal court); and *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668 (1996) (extending *Connick* protections and limitations to independent contractors with government contracts). If the speech does implicate a matter of public concern, then the employee's or contractor's First Amendment rights depend upon the "balance between the interests of the [employee or contractor], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer [or contractor], in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 568 (1968) quoted in *Umbehr*, 518 U.S. at 672.

Previously, Brentwood Academy has argued that *Connick* and *Umbehr* are inapplicable to this case because "[t]he relationship between the TSSAA and its member schools is not that of employer/employee, nor is Brentwood Academy a service provider for the TSSAA." Instead, Brentwood Academy alleged, the TSSAA is nothing more than a government regulator, acting in a regulatory capacity. While possessing some surface appeal, this argument collapses upon close examination of Brentwood Academy's actual relationship with the TSSAA. Brentwood Academy is a full, voting member of the TSSAA. It has a voice in the composition of the TSSAA Board of Control and its Legislative Council and thereby has a voice in the content in the substance of TSSAA rules and regulations. Brentwood Academy officials are eligible to serve as members of either the Board of Control or the Legislative Council. In other words, far from being a mere private citizen, Brentwood

Academy is a functioning member of an (allegedly) government organization.

As a member of an alleged government organization, Brentwood Academy stands in much the same shoes as a public employee or contractor. Thus, the relevant constitutional distinction should not be between employees and members of a government organization, but between members of the government and members of the public at large. *cf., Umbehr*, 518 U.S. 668, 676. ("We have, therefore, 'consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.'") quoting *Waters v. Churchill*, 511 U.S. 661 (1994) (plurality opinion). As a result, unless the composition of Brentwood Academy's linebacking corps is a matter of "legitimate public concern" upon which "free and open debate is vital to informed decision-making by the electorate" (*Pickering*, 391 U.S. at 571-572), then this Court is not an appropriate forum for Brentwood Academy's First Amendment complaints.

The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). It is not and was not intended to be used as a weapon by disgruntled members of government embroiled in purely internal policy squabbles. The First Amendment is too grandiose a vehicle for Brentwood Academy's single-minded drive to the recruiting promised land.

C. Alternatively, Brentwood Academy's Recruiting Activities Constitute, At Most, Commercial Speech. The Recruiting Rule Is A Proper Limitation On That Speech.

The District Court held that the Recruiting Rule did not implicate commercial speech doctrines because the rule was not limited to a school's advertisements and/or solicitations and was therefore "inextricably intertwined with otherwise fully protected speech." *Brentwood Academy*, 13 F. Supp. 670 at 691 fn. 21. Because the ban included communications that merely "conveyed information" and also applied to coaches of public schools, the District Court concluded that the ban did not limit "purely commercial speech." However, such a rigid application of commercial speech definitions is at odds with recent decisions of this Court.

In *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), the plaintiffs, a company and individuals who threw "tupperware parties" in students' dormitory rooms, challenged a University rule that prohibited private commercial enterprises from operating on University campuses other than to provide certain specified services. 492 U.S. at 471-472. The plaintiffs argued that their "tupperware parties" were more than mere commercial speech. In addition to proposing a commercial transaction, their presentations touched on other subjects, such as how to be financially responsible and how to run an efficient home. *Id.*, at 474. As a result, the plaintiffs claimed, pure speech and commercial speech were "inextricably intertwined" and the entirety must, therefore, be classified as noncommercial. *Id.*

The Court disagreed, noting that the level of First Amendment scrutiny must depend upon "the nature of the speech taken as a whole" and the effect of the challenged regulation thereon. *Id.* Including the home economics elements into the tupperware parties "no more converted [plaintiffs] presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." *Id.*, 474-475. When the speech at issue in this case is "taken as a whole", it becomes clear that the Recruiting Rule clearly implicates only commercial speech. First, and most obviously, recruiting by a private school necessitates the proposal of the "commercial transaction" of tuition payments. Even when scholarships are involved, commercial transactions take place. The furnishing of thousands of dollars of tuition money to an individual who may later generate tens of thousands of dollars of gate receipts and tournament winnings to a member school is most certainly a commercial transaction. To say otherwise simply denies the stark reality of the purpose of private high school athletic scholarships.[3]

Additionally, the furnishing of practice information in connection with recruiting no more converts recruiting to pure speech than the furnishing of product delivery information after the purchase of mail order goods converts a sale to pure speech. In fact, one would be hard-pressed to think of a single example of a consummated commercial transaction in which the *only* speech that occurs is the proposal. The TSSAA's Recruiting

---

[3] Similarly, the act of inducing a star athlete to uproot, move and change public schools is laced with commercialism. Public schools, just like private schools, can generate vast sums of money from successful sports teams.

Rule is not "inextricably intertwined" with pure speech. Rather, even innocuous-seeming, recruiting-related "informational" speech is undeniably commercial at its heart.

Once speech is identified as commercial, the lawfulness of restrictions on that speech is analyzed as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next we must ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Fox, 492 U.S. at 475 quoting *Central Hudson Gas & Electric Corp. v. Public Services Comm'n of New York*, 447 U.S. 557, 566 (1980).

Recruiting concerns the lawful activity of high school athletics, and, for the sake of argument, we will assume that all of Brentwood Academy's recruiting activity is not misleading. Moving to the next step of the analysis, it is clear that the government interests served by the Recruiting Rule are significant. The District Court properly noted that the state has a "compelling interest in preventing conduct that is harmful to the student-athlete." *Brentwood Academy*, 13 F. Supp. 670 at 691. Additionally, the state, when conducting and overseeing athletic endeavors, certainly has an

interest in establishing as fair and level a playing field as possible.

The Recruiting Rule, by banning "undue influence" on a student to secure or retain that student for "athletic purposes" and by preventing students from being "singled out" on the basis of athletic ability, advances the TSSAA's legitimate, significant interests. When the Recruiting Rule is followed, athletic recruiting is essentially nonexistent and teams are able to compete on their own merits. More importantly, children and their parents are spared from the exploitation, high-pressure tactics and unrealistic expectations that often accompany recruiting activities by schools such as Brentwood Academy.

Finally, the Recruiting Rule, while extensive in its regulation of any conceivable recruiting activity, is no more extensive than is necessary to protect government interests. As has been stated repeatedly above, the Recruiting Rule targets athletic recruiting only. Schools remain free to reach out and "sell" their schools to prospective students for any other purpose – spiritual, academic, or otherwise. Schools merely need to take care that the only students they reach out to do not also just "happen" to run the 40 yard dash in 4.3 seconds.

IV. CONCLUSION

This Court should not permit Brentwood Academy to improperly wrap its single-minded quest for athletic fame and fortune in the cloak of the First Amendment. Brentwood Academy cannot "have it all." It must choose between compliance with narrow regulations that are within the scope and mandate of an organization it

chose to join and the unfettered freedom (but diminished glory) of an independent existence. For all of the foregoing reasons, even if this Court holds that the TSSAA is a state actor, it should find that the TSSAA has not violated Brentwood Academy's First Amendment free speech rights. The judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

DANNY C. REEVES
Counsel of Record
GREENEBAUM DOLL & MCDONALD,PLLC
333 West Vine Street
Suite 1400
Lexington, Kentucky 40507
(606) 231-8500

DAVID A. FRENCH
CORNELL LAW SCHOOL
Myron Taylor Hall
Ithaca, New York 14850
(607) 255-0146

Attorneys for Amicus Curiae
KENTUCKY HIGH SCHOOL ATHLETIC ASSOCIATION